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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LARRY D. JONES, Defendant and Appellant.	H033973 (Santa Clara County Super. Ct. No. CC473982)

Defendant Larry D. Jones was charged, via information, with grand theft of property valued at over $400 (Pen. Code, §§ 484-487, subd. (a)),[1] petty theft with a prior conviction (§ 666), five prior strike convictions (§§ 667, subd. (b)-(i); 1170.12), and three prior prison terms (§ 667.5, subd. (b)). A jury convicted defendant of grand theft, and the trial court found true the alleged strike convictions and prior prison terms. The trial court sentenced defendant to 28 years to life in state prison, consisting of 25 years to life for the grand theft conviction and consecutive one year terms for each of the three prison priors. The petty theft count was dismissed. On appeal, defendant contends there is insufficient evidence to support the grand theft conviction. Defendant also claims his attorney provided ineffective assistance of counsel in failing to request inclusion of jury

[1] Further unspecified statutory references are to the Penal Code.

instruction CALCRIM No. 1860 and in failing to object to the owner's valuation of the stolen property. We will affirm the judgment.

I. BACKGROUND

At 2:00 p.m. on October 21, 2004, Julia Benividez was sitting in her car in Milpitas, waiting to pick up her son from school. The window on the front passenger side was partially open. A man, later identified as defendant, approached the passenger side of Benividez's car and asked for change. Benividez replied that she had no money. After additional requests for change were rebuffed, defendant reached through the open window and grabbed Benividez's purse from the front passenger seat. Defendant walked quickly to a nearby green truck and drove away. Benividez followed defendant in an attempt to record his license plate number.

The speeding green truck, with Benividez's car following it attracted the attention of a crossing guard at a nearby school crosswalk. The crossing guard, Lucille Salzman, wrote down the truck's license plate number and stopped Benividez. Defendant had driven by Salzman in the other direction several minutes earlier and he had turned to look at her.

Using the license plate number provided by Salzman, a Milpitas police officer discovered that the green truck had been reported stolen. The day after the purse theft, the truck was found abandoned in San Francisco. Defendant's fingerprints were on a beer bottle and cigarette packaging found inside the truck. Ten days later, on October 31, 2004, Benividez identified defendant in a photo lineup. Both Benividez and Salzman identified defendant in court as the man involved in the October 21 incident.

Benividez detailed the contents of her purse for the responding police officer and estimated the total value of the purse and its contents at $507: blue purse ($20); wallet ($20); gold ring with cubic zirconium stone ($60); gold rosary necklace with cross ($400); and seven dollars in change. When first questioned at trial, Benividez could not recall the value of her stolen purse and its contents. After reviewing the police report, she

testified on direct that the items were worth approximately $400. The purse and its contents were not returned.

On cross-examination, Benividez confirmed the more detailed valuations she gave to the Milpitas police officer at the time of the incident. She explained that she had purchased most of the items herself, including the ring. The valuations, she acknowledged, were only estimates and she did not have receipts. In regard to the gold necklace, however, the following exchange occurred:

"[DEFENSE COUNSEL:] Now, that $400 value, that's an estimate on your part, right?

"[BENIVIDEZ:] Yes.

"[DEFENSE COUNSEL:] Because it was a gift, right?

"[BENIVIDEZ:] Right.

"[DEFENSE COUNSEL:] And, of course, someone who gave you the gift was doing the right thing and took the price tag off before they gave it to you, right?

"[BENIVIDEZ:] Right.

"[DEFENSE COUNSEL:] And so it could be less than $400?

"[BENIVIDEZ:] No.

"[DEFENSE COUNSEL:] How do you know?

"[BENIVIDEZ:] Because my father gave it to me and he told me the price and I knew the price."

Defendant rested on the state of the evidence. In closing, defense counsel argued, among other things, that Benividez "was not able to accurately recall exactly how much these things were worth and that based on that the correct verdict should be not guilty of grand theft."

II. DISCUSSION

A. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to establish that defendant stole items worth over $400. In particular, defendant contends that because Benividez's estimate of the necklace's worth was based on inadmissible hearsay, the estimate was unreliable and is legally insufficient to support the grand theft conviction. We disagree.

Standard of Review

In considering a claim of insufficient evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576 (*Johnson*), quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Substantial evidence in a criminal case is "evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Johnson*, at p. 578.) "A judgment supported by the testimony of witnesses who have not been discredited and whose testimony is not inherently improbable will be affirmed." (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1439.)

Forfeiture

The Attorney General argues at the outset that defendant, by failing to object below, forfeited any claim regarding the admissibility of Benividez's testimony on the value of the necklace. To the extent defendant's argument may be read to challenge the admissibility of the alleged hearsay statement or, more broadly, Benividez's lay opinion regarding the value of the necklace, we agree with the Attorney General. "Generally, reviewing courts will not consider a challenge to the admissibility of evidence absent ' "a specific and timely objection in the trial court on the ground sought to be urged on appeal." ' [Citations.]" (*People v. Champion* (1995) 9 Cal.4th 879, 918.) Indeed, such an objection "is statutorily required to preserve a claim of error in the admission of

evidence. (Evid. Code, § 353.)" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1181; see also *People v. Lewis* (2001) 26 Cal.4th 334, 357 [failure to make a timely objection regarding the personal knowledge of witness waives claim on appeal].) Here, defendant raised no objection regarding either the alleged hearsay or Benividez's opinion testimony. We therefore limit our inquiry to the sufficiency of the evidence as admitted at trial.

Evidence of the Value of the Stolen Items

Grand theft is defined as the taking of personal property "of a value exceeding four hundred dollars ($400)[.]" (§§ 487; 484.) "In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test . . . ." (§ 484, subd. (a); see also *People v. Gray* (1976) 65 Cal.App.3d 220, 226 [individual items taken as part of a single offense may be added together to determine whether the offense constitutes grand theft].) The fair market value of an item, in general, is the price it would bring in an open market between a willing buyer and seller, not its special value to the owner or its replacement cost. (*People v. Pena* (1977) 68 Cal.App.3d 100, 102-104; *People v. Cook* (1965) 233 Cal.App.2d 435, 437-438.)

There is ample evidence in the record for a rational jury to find that the value of the stolen items exceeded $400. Benividez testified, without objection, that she believed the necklace to be worth $400 and the total value of the stolen items to be $507. The general rule is that "[t]he opinion of an owner of personal property is in itself competent evidence of the value of that property, and sufficient to support a judgment based on that value." (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921 (*Schroeder*); see also *People v. More* (1935) 10 Cal.App.2d 144, 145 ["The owner of property is a competent witness to testify as to its value."].) "The weight to be given the owner's testimony as to value is for the trier of the fact." (*People v. Henderson* (1965) 238 Cal.App.2d 566, 567 (*Henderson*); accord *Schroeder*, at p. 921.)

Defendant contends that the hearsay testimony—Benividez's statement that her father told her the necklace was worth $400—is so unreliable that it undermines

Benividez's estimate of the necklace's value and renders the grand theft conviction unsupported. We do not agree. "In judicial proceedings, the rule is well established that incompetent hearsay admitted *without objection* is sufficient to sustain a finding or judgment." (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 430 -431; see also *People v. Wade* (1956) 138 Cal.App.2d 531, 533 [hearsay statements introduced without objection become "competent support for the conviction"].) If so received, "hearsay is to be considered and weighed with all the other evidence and given such credence and weight as the trier of fact deems it entitled to have." (*People v. Bodkin* (1961) 196 Cal.App.2d 412, 420.)

Defendant relies primarily on *People v. Licalsi* (1929) 99 Cal.App. 321 (*Licalsi*) and *People v. Robertson* (1931) 117 Cal.App. 1 (*Robertson*) to support his contention. Neither case is relevant to our analysis. Unlike here, the defendant in *Licalsi* objected at trial to the evidence submitted to establish the value of a stolen diamond ring. (99 Cal.App. at p. 321.) Moreover, the only testimony regarding the ring's value was from a jeweler who had never seen the ring and had no knowledge of the stone's character, cut, or possible imperfections. (*Id*. at p. 322 ["In such circumstances, manifestly it would be impossible for anyone to fix its value."].) In *Robertson*, the defendant, on behalf of his brother, contracted to buy 2,000 chickens of varying quality from the victim. (117 Cal.App. at pp. 2-3.) Defendant made a partial payment for the chickens, took delivery of only the largest chickens, and declined to honor the remainder of the contract; he was convicted of grand theft. (*Id*. at pp. 2-4.) The appellate court first found insufficient evidence of felonious intent. (*Id*. at p. 5.) The court then noted that even if a theft was committed, the theft was not of the entire value of the chickens, but "the excess value of these particular chickens over the average contract price." (*Ibid*.) The court found no evidence of the excess value aside from a single unreliable statement regarding the market value of chickens. (*Ibid*.) *Robertson*'s valuation observations are inapplicable to the instant case: The discussion was secondary to the court's judgment

and made in the context of what was essentially a contract dispute. Additionally, the *Robertson* court made no mention of the general rule that an owner is competent to testify regarding the value of his or her property.

Benividez estimated the value of the stolen items at $507 and the defense presented no contradictory evidence. Benividez's statement that her father told her the necklace was worth $400 was submitted to the jury without objection. The evidence as admitted, and believed by the jury, is sufficient to establish the value of the stolen goods as being in excess of $400. We therefore find sufficient evidence to support the conviction for grand theft.

B. Ineffective Assistance of Counsel

Defendant contends that defense counsel's representation was constitutionally deficient for two separate reasons: (1) counsel failed to request CALCRIM No. 1860, a jury instruction regarding the evaluation of a witness's opinion of the value of his or her property; and (2) counsel failed to object to the hearsay-based valuation of the stolen necklace. We find that counsel's representation was that of a reasonably competent and diligent advocate. We therefore reject defendant's claim.

Standard of Review

"A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 440; see also *People v. Anderson* (2001) 25 Cal.4th 543, 569; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) "If the record on appeal

sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

CALCRIM No. 1860

Defendant contends that counsel's failure to request CALCRIM No. 1860 constitutes ineffective assistance. CALCRIM No. 1860, a Judicial Council of California criminal jury instruction, states: "A witness gave [her] opinion of the value of the property [she] [allegedly] owned. In considering the opinion, you may but are not required to accept it as true or correct. Consider the reasons the witness gave for any opinion, the facts or information on which [she] relied in forming that opinion, and whether the information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable or unreasonable. You may give the opinion whatever weight, if any, you believe it deserves."

Defendant concedes that the burden was on defense counsel to request this instruction. The instruction is relevant to Benividez's testimony regarding the value of the stolen items and the bench notes state that the instruction should be given "on request." (See Judicial Council of Cal., Crim. Jury Instns. (2009-2010) Bench Note to CALCRIM No. 1860.) The reason why counsel did not request CALCRIM No. 1860 does not appear in the record. However, competent counsel could have reasonably concluded that the subject was adequately covered in the cross-examination of Benividez, in defense counsel's closing argument, and in the jury instructions relating to witnesses generally.

Defense counsel spent considerable time questioning Benividez on her estimation of the value of the stolen items, thereby highlighting the issue for the jury. In closing argument, counsel explicitly questioned Benividez's estimation and urged the jury to take her uncertainty into account when considering the charge of grand theft. Finally, the jury

was given CALCRIM No. 226 and CALCRIM No. 301 regarding witness testimony and CALCRIM No. 332 regarding expert opinion testimony. The jurors were instructed, in relevant part, to use their "common sense and experience" to decide whether testimony is true, that they "alone must judge the credibility or believability" of each witness, that they "may believe all, part, or none of any witness's testimony," and that they "may consider anything that reasonably tends to prove or disprove the truth or accuracy" of the witness's testimony. The jurors also were instructed that they need not accept expert opinions as "true or correct" and that they "may disregard any opinion that they find unbelievable, unreasonable, or unsupported by the evidence." Through CALCRIM No. 301, the jurors were further admonished that "[b]efore you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

We conclude that defense counsel's approach to Benividez's testimony, combined with those jury instructions given, apprised the jury of the primary principle of CALCRIM No. 1860: it is the jury's responsibility to analyze, weigh, and choose whether to accept a witness's testimony as to the value of his or her property. We thus find that it is not reasonably probable that a more favorable determination would have resulted had counsel requested CALCRIM No. 1860. Accordingly, defendant has not shown that the failure to request CALCRIM No. 1860 constituted ineffective assistance of counsel.

Valuation of the Necklace

Defendant claims that competent counsel would have objected to Benividez's valuation of the necklace. Even assuming that Benividez's testimony that the gold necklace was worth $400 was based solely on inadmissible hearsay, we would reject defendant's contention that counsel's conduct amounted to constitutionally deficient assistance of counsel.

Hearsay is evidence of a statement made outside of court and offered in court for its truth. (Evid. Code, § 1200, subd. (a).) As a general rule, hearsay evidence is

inadmissible. (Evid. Code, § 1200, subd. (b).) Benividez's testimony that her father told her the price of the necklace constitutes hearsay. The statement falls under no apparent exception to the hearsay rule and would have been subject to exclusion, had counsel objected. "In stating an opinion as to the value of his property, an owner is bound by the same rules of admissibility as is any other witness." (*Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 Cal.App.3d 58, 65; accord Evid. Code, § 803.)

Absent the hearsay testimony, there is little support in the trial transcript for Benividez's valuation of the necklace: Benividez did not purchase the necklace and made no statement indicating personal knowledge of when and where the necklace was purchased, its purchase price, or its current value.[2] The Attorney General stresses that the prosecution may rely on the owner's lay opinion as to the value of his or her property. We do not quarrel with this general proposition. However, to testify competently regarding the value of property, the witness, even if the owner of the property, must have personal knowledge of the property's cost or current value. In *People v. Haney* (1932) 126 Cal.App. 473 (*Haney*), which set forth the owner rule, the court specifically found that "[t]he owner of personal property *who is familiar with its original cost and use* is qualified to testify regarding its value[.]" (*Id.* at p. 475, italics added.) *People v. Coleman* (1963) 222 Cal.App.2d 358 (*Coleman*) and *Henderson, supra,* 238 Cal.App.2d 566 follow *Haney* and illustrate the principle. In *Coleman*, the owner of the stolen automotive tools "was an automobile mechanic" who testified that "he had paid $600 for some of the tools approximately five months prior to the theft, and he had not finished making the payments on the other tools." (*Coleman,* at p. 361.) The court concluded that "[u]nder such circumstances it is reasonable to infer that the owner was familiar with the cost, condition, and use of the tools[,]" and, thus, "was qualified to testify as to the value

[2] Benividez did state that she "knew" the price of the necklace, but only after testifying that her father told her the price. It is unclear from the record whether she had any basis other than her father's statement for knowing the price of the necklace.

of the tools." (*Ibid*.) The witness in *Henderson* presented similar details: "The owner testified that the stolen watch was worth $1800 and the stolen ring $1200; he had purchased them from established jewelers for these sums; and he had with him the receipts for them." (*Henderson, supra,* 238 Cal.App.2d at pp. 566-567 [affirming the judgment].) Analogous details are lacking in this case. Thus, on the record before this court, an objection to Benividez's opinion testimony regarding the value of the necklace would have been well-founded.

There is no affirmative explanation in the record for defense counsel's failure to object to the hearsay-based valuation of the necklace. We therefore consider whether defendant has met his burden to show there is no satisfactory explanation for counsel's inaction.

The decision whether to object to inadmissible evidence is a tactical one and is accorded substantial deference on appeal. (*People v. Riel* (2000) 22 Cal.4th 1153, 1185.) " '[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings.' " (*Id*. at p. 1197.) "An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

Reviewing the record, we can conceive of more than one strategic reason for counsel's failure to object to the hearsay-based valuation. Counsel may have concluded that the argument that Benividez's valuation testimony is unreliable was preferable to an objection. Defense counsel sought to undermine Benividez's estimation of the necklace and other items in the purse through his cross-examination. Twice in closing argument defense counsel stressed Benividez's uncertain and vague testimony regarding the value

of the stolen items. Counsel relied on Benividez's alleged uncertainty as his final argument for acquittal on the charge of grand theft. Had the court sustained an objection to Benividez's $400 estimate, the prosecution could have sought to introduce additional evidence relating to the necklace's value. The prosecution could have called Benividez's father to testify regarding his purchase of the necklace. Alternatively, the prosecution could have submitted testimony from Benividez regarding the exact nature of the necklace and expert testimony on the value of similar jewelry. It is also possible that Benividez had additional personal knowledge regarding the value of the necklace and counsel did not want to elicit that information. Benividez stated: "[M]y father gave it to me and he told me the price *and I knew the price*." In these circumstances, competent counsel could have determined that the risk of the jury hearing additional, credible testimony relating to the necklace's value was not worth the reward of a successful objection to Benividez's estimate.

Additionally, defense counsel may not have wanted to distract the jury from the primary defense argument—that the witnesses were mistaken in their identification of defendant. Counsel spent considerable time questioning Benividez's and Salzman's identifications of defendant and the analysis of the fingerprint experts. In closing, counsel stressed the fallibility of eyewitness identifications, Benividez's uncertainty regarding the long-ago events and defendant's identification, and the fact that defendant's prints were not found anywhere on the truck itself. In a one-day trial, additional witnesses and/or testimony relating solely to the necklace would have placed undue emphasis on the stolen items and their value to the victim. Competent counsel could have concluded that an objection, with its resulting focus on the necklace's value, would serve only to undermine the broader defense that defendant was not the thief.

We find reasonable tactical bases for defense counsel's failure to object to the hearsay-based valuation of the necklace. Thus, defendant has not shown that counsel's failure to object constituted ineffective assistance of counsel.

III. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

_____
MCADAMS, J.